

### Third Supplement to Memorandum 2009-34

#### **Statutes Made Obsolete by Trial Court Restructuring: Part 5 (Staff Draft Tentative Recommendation)**

---

The Commission has received a letter from Daryl Kennedy, General Counsel of the Shasta County Superior Court. The letter is attached as an exhibit. The staff appreciates his comments.

On behalf of the court, Mr. Kennedy expresses concern with the proposed amendments to Evidence Code Section 731. That provision governs compensation of a court-appointed expert, an interpreter for a witness, and a translator of a writing offered in evidence. See Evid. Code §§ 730, 752, 753. Mr. Kennedy's comments on Section 731 relate to a court-appointed expert.

#### **Compensation of a Court-Appointed Expert**

Section 731 provides that responsibility for paying a court-appointed expert belongs to the county or the parties, depending largely on the nature of the underlying case. In a criminal or a juvenile case, Section 731 provides that the county pays. In a civil case, the parties pay, except the county may elect to pay for court-appointed experts in civil cases.

The staff draft tentative recommendation proposes amendments to Section 731 to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, under which the county is no longer responsible for paying "court operations." The proposed amendments would provide that the court, not the county, is responsible for payment of a court-appointed expert in a criminal or a juvenile case. The proposed amendments would also authorize the court, instead of the county, to elect to pay for court-appointed experts in civil cases.

#### *Court-Appointed Expert in a Criminal or Juvenile Case*

Mr. Kennedy objects to the amendments that would provide that the court, not the county, is responsible for payment of a court-appointed expert in a criminal or a juvenile case. See Exhibit p. 1.

---

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The provisions that set forth “court operations” provide that such operations include “court-appointed expert witness fees (for the court’s needs).” See Cal. Ct. R. 10.810(d), Function 10; see Gov’t Code § 77003. Mr. Kennedy asserts that compensation for an expert *not appointed for the court’s needs* continues to be a county responsibility.

Based on a literal interpretation of the provisions, that makes sense. **The staff therefore recommends revising Section 731 to distinguish between an expert appointed for the court’s needs in a criminal or juvenile case, and an expert appointed for other purposes in a criminal or juvenile case.** Accordingly, Section 731 should be revised so that in a criminal or juvenile case, the court would pay an expert appointed for the court’s needs, and the county would pay an expert appointed for other purposes.

As discussed below, similar revisions appear appropriate with regard to a medical expert appointed by the court in a civil case.

#### *Court-Appointed Medical Expert in a Civil Case*

The proposed amendment in the staff draft recommendation would authorize the court, instead of the county, to elect to pay for court-appointed medical experts in civil cases. However, it appears that authority to elect to pay for such experts, when appointed for purposes other than for the court’s needs, should belong to the county, not the court.

Accordingly, **Section 731 should be revised to authorize the court to elect to pay medical experts appointed for the court’s needs in civil cases, and to authorize the board of supervisors to elect to pay medical experts appointed for other purposes in civil cases.**

#### *Staff Recommendation*

Taking together all of the above, **the staff recommends that Section 731 be amended along the following lines instead of as shown in the draft attached to Memorandum 2009-34:**

#### **Evid. Code § 731 (amended). Compensation of court-appointed expert**

SEC. \_\_\_\_\_. Section 731 of the Evidence Code is amended to read:

731. (a) In all criminal actions and juvenile court proceedings, the compensation fixed under Section 730 for an expert appointed for the court’s needs shall be a charge against the court. The compensation fixed under Section 730 for an expert appointed for other purposes shall be a charge against the county in which such

the action or proceeding is pending and shall be paid out of the treasury of ~~such that~~ county on order of the court.

(b) In any county in which the superior court so provides, the compensation fixed under Section 730 for medical experts appointed for the court's needs in civil actions shall be a charge against the court. In any county in which the board of supervisors so provides, the compensation fixed under Section 730 for medical experts appointed in civil actions, for purposes other than the court's needs, in such county shall be a charge against and paid out of the treasury of ~~such that~~ county on order of the court.

(c) Except as otherwise provided in this section, in all civil actions, the compensation fixed under Section 730 shall, in the first instance, be apportioned and charged to the several parties in ~~such~~ a proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs.

**Comment.** Subdivisions (a) and (b) of Section 731 are amended to reflect the enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655). See, e.g., Gov't Code §§ 77001 (local trial court management), 77003 ("court operations" defined), 77200 (state funding of "court operations"); see also Cal. R. Ct. 10.810, Functions 4 (court interpreters) & 10 (referring to "court-appointed expert witness fees (for the court's needs)").

Subdivisions (a), (b), and (c) are also amended to make stylistic revisions.

Because Section 731 also governs compensation of an interpreter for a witness and a translator of a writing offered in evidence, additional statutory revisions may be appropriate. Such revisions are considered below.

### **Compensation of an Interpreter for a Witness or a Translator of a Writing Offered in Evidence**

Evidence Code Section 752 provides that Section 731 governs compensation of an interpreter for a witness. Similarly, Evidence Code Section 753 provides that Section 731 governs compensation of a translator of a writing offered in evidence. Mr. Kennedy's comments did not discuss the application of Section 731 to such persons.

The staff draft tentative recommendation would treat compensation of an interpreter for a witness or a translator of a writing offered in evidence as a court operation. Based on the information currently available to the staff, that still appears to be the correct approach.

To continue with that approach if Section 731 were to be amended as discussed above, **the tentative recommendation should include the following revisions of Evidence Code Sections 752 and 753:**

**Evid. Code § 752 (amended). Interpreters for witnesses**

SEC. \_\_\_\_\_. Section 752 of the Evidence Code is amended to read:

752. (a) When a witness is incapable of understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

(b) The record shall identify the interpreter who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3, in the same manner as an expert appointed for the court's needs.

**Comment.** Subdivision (b) is amended to reflect enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655).

**Evid. Code § 753 (amended). Translators of writings**

SEC. \_\_\_\_\_. Section 753 of the Evidence Code is amended to read:

753. (a) When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing.

(b) The record shall identify the translator who may be appointed and compensated as provided in Article 2 (commencing with Section 730) of Chapter 3, in the same manner as an expert appointed for the court's needs.

**Comment.** Subdivision (b) is amended to reflect enactment of the Lockyer-Isenberg Trial Court Funding Act, 1997 Cal. Stat. ch. 850 (see generally Gov't Code §§ 77000-77655).

**The Commission should decide whether or not to include these revisions, with or without change, in the tentative recommendation.** If the Commission approves the reforms recommended in this memorandum, the staff would make conforming changes to the narrative part of the tentative recommendation.

Respectfully submitted,

Catherine Bidart  
Staff Counsel

Barbara Gaal  
Chief Deputy Counsel

Daryl E. Kennedy  
General Counsel  
Superior Court of California, County of Shasta  
1500 Court St., Room 205  
Redding, CA 96001  
530-229-8160

August 25, 2009

Catherine Bidart, Staff Counsel  
Barbara Gaal, Chief Deputy Counsel  
California Law Revision Commission  
4000 Littlefield Rd, Room D - 2  
Palo Alto, CA 94303-4739

Re: Law Revision Commission Study on Statutes Made Obsolete by Trial  
Court Restructuring (Part 5)

Dear Ms. Bidart and Ms. Gaal:

I am writing on behalf of the Shasta County Superior Court to comment on proposed revisions to Evidence Code section 731 outlined in the California Law Revision Commission's staff draft of a tentative recommendation dated July 20, 2009 ("Tentative Recommendation").

Evidence Code section 731 deals with compensation of court-appointed experts. It appears that the Tentative Recommendation proposes to amend section 731 to require that trial courts pay for all court-appointed experts in criminal and juvenile proceedings. If that is in fact the intent of the Tentative Recommendation, it paints with too broad a brush and would result in a dramatic change of current law.

The Tentative Recommendation asserts that under current law, the employment of court-appointed experts in criminal and juvenile cases is a "court operation" for which trial courts must pay under the Trial Court Funding Act. The Tentative Recommendation cites Government Code section 77003(a)(8) and California Rule of Court 10.810(d), Function 10, as authority for this assertion. However, the cited authorities actually state that court-appointed experts are only a court operation if the expert is appointed for the court's own needs. Cal.R. Ct. 10.810(d), Function 10. Experts that are not appointed for the court's own needs continue to be county responsibilities. 87 Ops.Atty.Gen. 62 (5-13-09).

As a result of this distinction, the California Attorney General has concluded that the costs of court-appointed experts in two significant categories of proceedings continue to be county responsibilities, namely, (1) experts appointed pursuant to a defendant's "not guilty by reason of insanity" ("NGI") plea under Penal Code sections 1026 et seq., and (2) experts appointed at the request of a person who is the subject of a Sexually Violent

Predator Act ("SVPA") proceeding under Welfare & Institutions Code sections 6600 et seq.

The costs of court-appointed experts in such cases are substantial. Those experts are retained for the purpose of testifying at jury trials, which often involves one or more full days of testimony, plus preparation time, all paid at the expert's professional hourly rate. Requiring trial courts to begin paying these costs without any increase in funding would have an extremely negative effect on trial court budgets, and quite frankly, would be unfair. The court has no discretion regarding the appointment of experts in NGI and SVPA proceedings; rather, the appointment of such experts is mandatory if a defendant enters a NGI plea or if an indigent person requests an expert in a SVPA proceeding. Penal Code section 1027(a); Welfare & Institutions Code section 6605(d).

The Shasta County Superior Court therefore requests that any revisions to Evidence Code section 731 be written to ensure that the costs of court-appointed experts in NGI and SVPA proceedings continue to be county responsibilities. If any change is to be made in this area, it should be done through normal legislative channels so funding issues can be addressed.

Thank you for your consideration.

Very truly yours,

Daryl E. Kennedy  
General Counsel  
Shasta County Superior Court

Cc: Hon. Stephen H. Baker, Presiding Judge  
Melissa Fowler-Bradley, Court Executive Officer